IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 7, 2006 Session

DOUGLAS F. CUNHA and wife, ELIZABETH D. CUNHA v. MIKE CECIL and BARRY J. WEBER

Direct Appeal from the Chancery Court for Sevier County
No. 03-5-228 Hon. Telford E. Forgety, Jr., Chancellor

No. E2006-01066-COA-R3-CV - FILED JANUARY 31, 2007

The Trial Court held the statute of repose, Tenn. Code Ann. § 28-3-202, barred plaintiffs' claims pursuant to the Tennessee Consumer Protection Act. On appeal, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

Jack M. Tallent and Paul E. Helton, Knoxville, Tennessee, for appellants.

Edward H. Hamilton, Sevierville, Tennessee, for appellees.

OPINION

Plaintiffs brought this action against defendants, alleging that they purchased a home from defendants on November 10, 1999, which had been constructed by Cecil Construction Company, which was owned by defendant Cecil. They averred that before buying the home, they saw evidence of water in the basement and asked defendant Cecil about the condition, and Cecil told them that a water problem had existed that had been corrected. They averred they noticed further defects, and after they moved into the house in June 2001, after a hard rain they noticed water in the basement. At that point, Cecil acknowledged the problem and agreed to make repairs.

Plaintiffs further stated that defendants called Volunteer Concrete and Waterproofing to make the repairs, and that Volunteer determined that the drains around the foundation of the house were not properly installed when the house was built, and advised plaintiffs that it could not stop

the water intrusion until the drains and grading were repaired or reinstalled.

Plaintiffs asserted that, prior to the sale, defendants made deceptive, false, and misleading representations that the water problem had been corrected, and that they relied upon the same in purchasing the house. Plaintiffs charged violations of the Tennessee Consumer Protection Act, and sought damages, attorney's fees, "enhanced" damages, and rescission of the contract. Subsequently, plaintiffs amended their Complaint and asserted that Cecil knew the water problem was not fixed when he told plaintiffs it was, and the cracks in the basement walls were not settlement cracks, and that he knowingly made false representation in violation of the Tennessee Consumer Protection Act.

The trial of this matter was conducted before a Special Master on December 15-17 and 22, 2004. Following the evidentiary hearing, the Special Master reported on February 22, 2005, and found that defendants, acting as joint venturers, completed construction of the subject home in January 1999. The home was offered for sale, and plaintiffs contracted to purchase the home in October 1999. Further, that the "Home Purchase Agreement" contained no express warranty provisions and provided for a purchase price of $239,000.00, and the closing occurred on the sale on November 10, 1999.

The Special Master found that after closing in November 1999, the plaintiffs leased the home back to the defendants for one year, and that after plaintiffs moved in they noticed water in the basement and the cracks had gotten larger. The plaintiffs contacted Cecil who contacted Hurst, who attempted repairs numerous times to no avail. The Master further found there was no evidence that Cecil knew of the defective foundation, and there was no evidence of any intent to deceive or mislead, but defendants promised to take corrective steps with regard to any leaks and did so, thus supporting the conclusion that the promise was made with intent to perform, and there was no proof of an unfair or deceptive act or practice that would be in violation of the Consumer Protection Act.

The Master found that the home did have an implied warranty of good workmanship and materials, as first recognized in *Dixon v. Mountain City Construction*, 632 S.W.2d 538 (Tenn. 1982), and that the warranty extended for a period of four years from the date of sale (Nov. 10, 1999). The Master found a breach of this warranty by defendants, and for this breach that the plaintiffs damages would be $73,000.00, which was the diminution in value of the home. The Special Master concluded, however, that if the statute of repose (Tenn. Code Ann. §28-3-202) controlled, the "four year 'protection' of the warranty is illusory given that the statute of repose, by its terms, begins to run from the date of substantial completion irrespective of the date of sale." The Master held that substantial completion occurred in January 1999, and that the plaintiffs were not aided by Tenn. Code Ann. §28-3-203, as their injury did not occur in the fourth year following substantial completion, as shown by this Court's opinion in *Hammonds v. Jones*, 1997 WL 408788 (Tenn. Ct. App. 1997). The Master held that the injury occurred in June 2001 when plaintiffs discovered the leaking. The Master concluded that the plaintiffs claims were barred by the statute of repose.

Plaintiffs filed a timely objection to the Master's Report, and the Trial Court found the Special Master's Report should be "approved, ratified, affirmed and adopted by this Court in its entirety."

While several issues are raised on appeal, the determinative issue is whether the Statute of Repose bars plaintiffs' action.

The findings of fact of the Special Master, which were concurred in by the Trial Court, are conclusive on appeal if supported by material evidence. As this Court has stated: "A concurrent finding of a master and a trial court is conclusive on appeal, except where it is upon an issue not proper to be referred, where it is based on an error of law or a mixed question of fact and law, or where it is not supported by any material evidence." *Coates v. Thompson*, 713 S.W.2d 83 (Tenn. Ct. App. 1986); see also Tenn. Code Ann. §27-1-113. Conclusions of law are reviewed *de novo* with no presumption of correctness, as with any other case. *Phillips v. A&H Const. Co., Inc.*, 134 S.W.3d 145 (Tenn. 2004).

First, plaintiffs insist their claims pursuant to the Tennessee Consumer Protection Act were "separate, independent claims", and not subject to the statute of repose. Plaintiffs argue their claims based on the Consumer Protection Act did not arise until the plaintiffs discovered the injury, i.e., when Cecil failed to make good on his promise to fix the leaks, which did not occur until one or two months before they filed suit, and that the statutes have no bearing on their TCPA claim, and that the proper statute of limitations for the same would be the one year from the date of discovery, and argue that their claims were timely made. One of the numerous cases interpreting what is now Tenn. Code Ann. §28-3-202 is *Watts v. Putnam County*, 525 S.W.2d 488 (Tenn. 1975), where the Supreme Court found that the purpose of Tenn. Code Ann. §28-3-202 was to "provide outer limits of liability (five years as a maximum) as to all potential actions based upon injury to person or property, and without regard to the date of discovery and without distinction between personal injury and property damage." *Id*. at 491. The Court noted the statute was almost verbatim to the Model Code proposed by the American Institute of Architects, the National Society of Professional Engineers, and the Associated General Contractors, and that similar statutes had been adopted between 1964 and 1969 in over thirty jurisdictions. *Id.* at 490.

The Court found that the statute was not a conventional statute of limitations, and stated that it did not extend the periods provided in other statutes, but was "superimposed" upon existing statutes. *Id*. at 491. Thus, the Court found that suits for personal injuries or property damage had to be brought within one and three year periods of limitations, respectively, from the date of injury/discovery, subject to the ceiling imposed by Tenn. Code Ann. §28-3-202. *Id.* at 491. Further, the Court held that Tenn. Code Ann. §28-3-202 was unrelated to the accrual of any cause of action, because it stated that it began to run on the date of substantial completion as opposed to the date of injury or damage. The Court further said the statute "must be construed to curtail and limit all other periods to the four-year period". *Id.* at 491. The Court continued that Tenn. Code Ann. §28-3-202 was a special statute, and that applicable special statutes prevailed over general statutes. *Id*. at 492. Thus, the Court recognized that there would be circumstances where the

limitations period was shortened due to the application of Tenn. Code Ann. §28-3-202, and noted that such "may be an inconsistent, inequitable and undesirable law, but it represents the clear legislative intent." *Id*. at 493.

This holding has been followed in numerous cases. *See, Cornwell v. Hodge*, 1986 WL 5890 (Tenn. Ct. App. May 23, 1986); *Chrisman v. Hill Home Development*, 978 S.W.2d 535 (Tenn. 1998); *Hammonds v. Jones*, 1997 WL 408788 (Tenn. Ct. App. July 23, 1997); *Automotive Financial Services, Inc., v. Azalea Terrace Partners, Ltd.*, 1996 WL 580998 (Tenn. Ct. App. Oct. 10, 1996); *Clinton Seafood, Inc., v. Harrington*, 1991 WL 50218 (Tenn. Ct. App. Apr. 10, 1991).

On the foregoing authority, we conclude the Trial Court properly concluded that the statute of repose, Tenn. Code Ann. §28-3-202, was a bar to plaintiffs' TCPA claim.

Next, plaintiffs argue that Mike Cecil Construction actually built the house and that the defendants were simply "vendors", who are not protected by the statute. The findings of the Special Master, which were concurred in by the Trial Court, are supported by material evidence. *See Coates*, and Tenn. Code Ann. §27-1-113. The evidence established that defendants were both "furnishing" the construction of the home as they were both funding the construction project via a joint bank account set up for that purpose, into which they both deposited money. The statute has been applied to bar claims against other joint venturer-builders of this type, who then offer the house for sale, and has also been applied to insulate contractors who were not owners, property owner/developers who were not the builders, subcontractors, manufacturers of materials used, etc. *See Chrisman, Hammonds, Clinton, Automotive,* and *Celotex, supra.* Under the authority of these cases, it is clear that both defendants fall within the protection of Tenn. Code Ann. §28-3-202.

Finally, plaintiffs argue that defendants should be estopped from relying on the statute of repose, based on principles of equitable and judicial estoppel. This argument is based on the fact that Cecil told them he would fix the problem, and they relied on the promise to their detriment. Plaintiffs rely on *Bernard v. Houston Ezell Corp.*, 968 S.W.2d 855 (Tenn. Ct. App. 1997), to "establish[ed] that a party may be equitably estopped from asserting the defense of a statute of repose because of continual assurances to correct problems, but fail[ed] to find appropriate circumstances in the case that was before the court".

Review of the *Bernard* case, however, shows that it involved a homeowner who purchased a new home and almost immediately became aware of standing water problems under and around the house, which caused damage to the property. The plaintiffs contacted the developer, who made various attempts to remedy the problems, and plaintiffs eventually hired an expert, who reported the cause of the problem as underground springs on the property. Plaintiffs claimed that defendant's attempts to remedy to problem, which were unsuccessful, and defendant's superior knowledge regarding the history of water problems on the property should estop defendant from relying on Tenn. Code Ann. §28-3-202. On appeal this Court stated that it did not "understand the general rule to be that any effort by a wrongdoer to remedy the effect of the wrongdoing would effectively bar the defense of the statute of limitations." *Id.* at 862. This Court went on to state that

there was no evidence that the defendant "represented, promised or contracted to remedy all of the subject defects in exchange for plaintiffs' delay in bringing suit, or that plaintiffs did allow the statute to expire in reliance upon such representation." *Id.* Thus, this Court did not find evidence sufficient to establish such an estoppel, and also questioned whether estoppel would apply in any event. *Id.*

Plaintiffs further argue that pursuant to *Jackson v. Kemp*, 365 S.W.2d 437 (Tenn. 1963), a statute of limitation may be waived, or "lost by conduct invoking the established principles of estoppel in pais." *Jackson* involved not a statute of repose, but a statute of limitation, and it also involved conduct whereby an insurance agent promised to plaintiff that he would not hire an attorney and would not file suit, and the agent would make sure the plaintiff was paid directly for his losses. The Supreme Court held that such conduct would toll the statute of limitation. In this case there is no such agreement or promise. More importantly, we find no authority in this jurisdiction that holds the statute of repose can be tolled for any reason. This is in accord with other jurisdictions which have held that a statute of repose cannot be tolled on the basis of equitable estoppel, but can only be tolled where there has been fraudulent concealment of the plaintiff's cause of action by the defendant. *See, e.g., Joslyn v. Chang*, 837 N.E.2d 1107 (Mass. 2005); *Baldwin v. Holliman*, 913 S.2d 400 (Miss. Ct. App. 2005); *Snyder v. Love*, 2006 WL 8526780 (Montana 2006); *Farber v. Lok-N-Logs, Inc.*, 701 N.W.2d 368 (Neb. 2005); and *Tomlinson v. George*, 116 P.3d 105 (NM 2005).

For the foregoing reasons, we find the plaintiffs issues to be without merit, and affirm the Judgment of the Trial Court. The cost of the appeal is assessed to plaintiffs, Douglas and Elizabeth Cunha.

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HERSCHEL PICKENS FRANKS, P.J.